BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUNIOR TAMAYO-PEREZ, Claimant, vs. HORMEL FOODS CORP., Employer, Self-Insured, Defendant.	:	File No. 20003849.06 ALTERNATE MEDICAL CARE DECISION HEAD NOTE NO: 2701

STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 85 and 17A. The expedited procedure of rule 876 IAC 4.48 is invoked by claimant, Junior Tamayo Perez. Claimant appeared through attorney, Jennifer Zupp. Defendant appeared through attorney, Abigail Wenninghoff.

The alternate medical care claim came on for hearing on July 8, 2022, at 10:30 a.m. The proceedings were digitally recorded. The recording constitutes the official record of this proceeding. Pursuant to the Commissioner's Standing Order, the undersigned has been delegated authority to issue a final agency decision in this alternate medical care proceeding. Therefore, this ruling is designated final agency action and any appeal of the decision would be to the Iowa District Court pursuant to Iowa Code section 17A.

The record consists of the agency file in this matter. Claimant filed this action on June 27, 2022, which included a 3-page argument as to why alternate care should be granted. On July 5, 2022, defendant filed a Motion to Dismiss Claimant's Petition for Alternate Medical Care. In this motion, defendant also requested that the agency stay any enforcement which included a few pages of attachments. The claimant filed a Resistance to Motion to Dismiss. The Motion to Dismiss was denied and the matter proceeded to hearing on July 8, 2022. The only purpose of the hearing was to listen to arguments on the legal issues presented by the parties. I have taken administrative notice of the previous alternate medical care files between the parties.

ISSUE

There are two issues presented. The first issue is whether this agency should grant a stay of enforcement. The second issue is whether the defendant has abandoned medical care.

FINDINGS OF FACT/PROCEDURAL HISTORY

The undersigned having considered all the evidence in the record finds:

The claimant has now filed six alternate medical care petitions. In his fifth alternate medical care petition (File No. 20003849.05), he was seeking medical treatment recommended by his authorized treating physician. The defendant sought to deny the compensability of that treatment, contending that it was not causally connected to his work injury. After reviewing the evidence and the past agency record in this matter, I determined that the principle of judicial estoppel applied and the defendant was prohibited from denying compensability. On the merits, I found that it was, in fact, unreasonable for the defendant to deny the treatment prescribed by the employer's authorized treating physician. This decision was entered on May 25, 2022.

On the same date, claimant's counsel emailed defense counsel requesting authorization of the treatment ordered in the decision suggesting specific treatment providers. (*See* attachment to Claimant's Petition) On June 3, 2022, defense counsel responded that the defendant intended to appeal the decision. (Id.)

On June 9, 2022, defendant timely filed a Petition for Judicial Review in Polk County regarding File No. 20003849.05. At some point, claimant filed a Petition for Entry of Judgment in File No. 20003849.05. On or about July 1, 2022, defendant filed an Application for Stay of Agency Proceedings and Motion to Dismiss Respondent's Petition for Entry of Judgment in District Court. At our July 8, 2022, hearing before the agency, both parties admitted that the District Court has not ruled upon the requested stay or the entry judgment.

The parties provided detailed, comprehensive written arguments in their filings before the agency. At hearing, the parties made additional arguments as well and answered questions of the undersigned on the record.

REASONING AND CONCLUSIONS OF LAW

I. Whether this agency has authority to grant a stay of enforcement.

File No. 20003849.05 has been properly appealed to the District Court. Any stay of enforcement of that action is properly before the District Court under Iowa Code Section 86.26(2) (2021), which states:

> 2. Notwithstanding section 17A.19, subsection 5, a timely petition for judicial review filed pursuant to this section shall stay execution or enforcement of a decision or order of the workers' compensation commissioner if the party seeking judicial review posts a bond securing any compensation awarded pursuant to the decision or order with the district court within thirty days of filing the petition, in a reasonable amount as fixed and approved by the court. Unless either the party posting the bond files an objection with the court, within twenty days from the

> date that the bond is fixed and approved by the court, that the amount of the bond is not reasonable, or the party whose interests are protected by the bond files an objection with the court, within twenty days from the date that the amount of the bond is fixed and approved by the court, that the amount of the bond is not reasonable or adequate, the amount of the bond shall be deemed reasonable and adequate. If, upon objection, the district court orders the amount of the bond posted to be modified, the party seeking judicial review shall repost the bond in the amount ordered, within twenty days of the date of the order modifying the bond, in order to continue the stay of execution or enforcement of the decision or order of the workers' compensation commissioner

I conclude that the agency has no authority to stay or enforce the alternate care decision in File No. 20003849.05. That matter is properly pending before the District Court which now has exclusive jurisdiction of the matter.

II. Should alternate care be granted?

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code section 85.27 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

In this case the claimant argues that the defendant has, since May 25, 2022, abandoned the claimant's medical care. Specifically, the claimant contends that on May 25, 2022, defendant was ordered to provide the care recommended by Hormel's authorized treating physician. This included a referral to a pain specialist, as well as some physical therapy. The May 25, 2022 Alternate Medical Care decision, however, did not specifically find that the defendant had abandoned medical care or that the claimant was entitled to choose his own physician at this point in time. The order simply stated that "Defendant shall authorize the care recommended by Dr. Eckhoff." (Alternate Medical Care Decision, File No. 20003849.05, p. 10) The claimant is now seeking an order that claimant can direct his own medical care.

The defendant argues strenuously that this is the exact issue which is pending in the District Court on judicial review.

Of course, the phrase "abandonment of care" does not appear in the statute. It is a phrase used within the workers' compensation law to describe a situation where an

employer has failed to provide reasonable care to an injured worker and sometimes results in an order that alternate medical care should be granted and the claimant, by order of the agency, has authority to direct his or her own care at the employer's expense. The Supreme Court has affirmed this remedy. West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1991) (the court upheld an agency decision that the defendant employer had "lost the right to choose the care" and that "allow and order other care" language is broad enough to include treatment by a doctor of the employee's choosing).

As set forth above, the employer ordinarily has the right to control the care provided to the employee. Iowa Code section 85.27(4). In Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 124 (Iowa 2003), the Supreme Court stated the following:

> The industrial commissioner has interpreted this section to mean that,
>
> > in Iowa, an employer and its insurer have the right to control the medical care claimant receives, with two exceptions. The first is where the employer has denied liability for the injury. The second is where claimant has sought and received authorization from this agency for alternative medical care.

Trade Professionals, Inc. v. Shriver, 661 N.W.2d at 124 (quoting Freels v. Archer Daniels Midland Co., #1151214 (7/30/2000)).

The problem for the claimant is that the only thing which has changed since the May 25, 2022, Alternate Medical Care decision is that the defendant employer has appealed that decision. Of course, the defendant has also continued to refuse to provide any treatment for the claimant as well. The defendant's right to seek judicial review of that decision, however, is an important statutory right of the defendant. In fact, I conclude it is fundamental to the defendant's right to due process. As set forth above, the specific issue of whether the May 25, 2022 Alternate Medical Care decision should be enforced or stayed is within the exclusive jurisdiction of the District Court. I conclude that it would be inappropriate for me to conclude at this time that the defendant has abandoned care simply because it appealed my decision.

This, however, does not end the analysis. Based upon the record in this case, the claimant's authorized treating physician recommended in April 2022, that claimant receive pain management treatment and physical therapy. Since that time, defendant has offered no treatment of any kind. The claimant is entitled to the treatment recommended by Dr. Eckhoff on April 18, 2022. Since the employer has not complied with this order to authorize a physician, the claimant may choose a pain management physician as recommended by Dr. Eckhoff. The physician selected by the claimant shall serve as a gatekeeper for his ongoing medical treatment. The employer shall be responsible for the expenses.

ORDER

THEREFORE IT IS ORDERED:

The claimant's application for alternate medical care is GRANTED as set forth above.

Signed and filed this 11th day of July, 2022.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jennifer Zupp (via WCES)

Abigail Wenninghoff (via WCES)